

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA NEIL HARRELL,  
Petitioner,  
v.  
FRANK LOPEZ,  
Respondent.

No. 2:21-cv-1227 KJN P

ORDER

Petitioner, a former state prisoner who appears to be on probation, proceeds pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

Title 28 U.S.C. § 2241 is the proper avenue for a state prisoner who wishes to challenge state custody without a state judgment. Stowe v. Murashige, 389 F.3d 880, 886 (9th Cir. 2004). But the Court of Appeals for the Ninth Circuit holds that 28 U.S.C. § 2254 is the exclusive avenue for a state court prisoner to challenge the constitutionality of his detention. See White v. Lambert, 370 F.3d 1002, 1007-10 (9th Cir. 2004), overruled on other grounds by Hayward v.

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1 Marshall, 603 F.3d 546 (9th Cir. 2010), overruled on other grounds by Swarthout v. Cooke, 562  
2 U.S. 216 (2011).

3 Here, petitioner challenges the constitutionality or validity of his August 23, 2018  
4 conviction in the Solano County Superior Court, Case No. FCR336781. (ECF No. 1 at 2.)  
5 Therefore, he must bring such challenge in a petition under 28 U.S.C. § 2254 rather than section  
6 2241. The § 2241 petition is dismissed, and petitioner is granted leave to file a petition under  
7 § 2254. Petitioner is cautioned that failure to comply with this order will result in a  
8 recommendation that this action be dismissed for lack of jurisdiction.

9 In accordance with the above, IT IS HEREBY ORDERED that:

- 10 1. Petitioner's motion to proceed in forma pauperis is granted;
- 11 2. Petitioner's application for writ of habeas corpus is dismissed with leave to amend  
12 within thirty days from the date of this order;<sup>1</sup>
- 13 3. Any amended petition must bear the case number assigned to this action and the title  
14 "Amended Petition"; and
- 15 4. The Clerk of the Court is directed to send petitioner the court's form application for  
16 writ of habeas corpus.

17 Dated: July 19, 2021

18   
19 KENDALL J. NEWMAN  
20 UNITED STATES MAGISTRATE JUDGE

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28 <sup>1</sup> By setting this deadline the court is making no finding or representation that the petition is not  
subject to dismissal as untimely.